MORGAN GUARANTY TRUST CO. NEW YORK

v.

LIAN SENG PROPERTIES SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[COMPANIES WINDING-UP NO. D1-42-577-1987]
23 JANUARY 1989

COMPANY LAW: *Winding-up - Supporting creditor obtained judgment against respondent - Application by petitioner to wind-up respondent - Supporting creditor granted mareva injunction against respondent - Respondent obtained injunction restraining supporting creditor from presenting original winding up petition during subsistence of present petition - Assignment of debts by petitioner to 3rd party - Supporting creditor granted further ex-parte injunction restraining respondent from disposing of its property and or freezing its bank accounts - Present application by respondent to set aside ex-parte order and further order to unfreeze bank accounts - Interest of general body of creditors - Section 223 Companies Act.*

Lian Seng Properties Sdn. Bhd. (Lian Seng) were the owners of KL Plaza Complex. Pembinaan KSY Sdn. Bhd. were the main contractors who had built the said complex.

On 13 March 1987 KSY obtained judgment for the sum of RM10,529,000 for progress payments due from Lian Seng.

Morgan Guaranty Trust Company New York (Morgan Trust) caused a winding up petition to be presented against Lian Seng on 10 December 1987. When KSY heard of the presentation of the petition it filed the requisite notice of intention to appear to support the petition.

On 13 August 1988, KSY were granted a *Mareva* injunction against Lian Seng.

Lian Seng, on 16 November 1988 obtained an injunction restraining KSY from presenting any original winding-up petition against Lian Seng during the subsistence of the petition of Morgan Trust.

The solicitors for Morgan Trust, by letter dated 8 December 1988 informed solicitors for KSY that their client had "sold off" its rights on which it had founded the petition, to a 3rd party.

On 12 January 1989 KSY took out its *ex-parte* application seeking an injunction restraining Lian Seng until disposal of the petition from disposing any of its property movable or immovable as well as a further injunction that would have the effect of freezing all the bank accounts of Lian Seng. The application was granted on 13 January 1989.

KSY's contention was that unless restrained, Lian Seng would continue to utilise these monies or otherwise paying certain debts in preference to unsecured creditors. On 16 January 1989, Lian Seng took out two applications, one seeking to set aside the said *ex-parte* order and for a consequential order for damages to be assessed and by the other application to vary the *ex-parte* injunction by unfreezing the bank accounts.

Held:

[1] There has been no suggestion that the accounts sought to be frozen were overdraft accounts which were in debit and there has been no evidence of pre-liquidation debts being discharged which cannot be unravelled when and if an account is taken in the course of distribution if in fact eventually an order to wind-up the company is made.

[2] The accusation of creaming or hiving away of part of the rentals complained of, turns out to be, on the evidence before the Court, to be baseless.

[3] There are sufficient reasons for the Court to conclude that the orders made *ex-parte* on 13 January 1989, should be set aside.

[4] No order is made in respect of damages arising.

[Order accordingly.]

For the applicant - Major M.S. Murthi; M/s. Murthi & Partners
For the respondent supporting creditor - P.S. Gill; M/s. Gill & Tang

JUDGMENT

VC George J:
[On encls. (50) & (51)]

On 10 December 1987 the Morgan Guaranty Trust company of New York (Morgan Trust) caused the instant petition to wind-up Lian Seng Properties Sdn. Bhd. (Lian Seng) to be presented.

Now, Pembinaan KSY Sdn. Bhd. (KSY) were the main contractor who had built the KL Plaza Complex for the owners Lian Seng, the contract amount being some RM98 million. KSY say that there is a substantial amount of the contract sum still to be paid to it although the contract works had been completed by 15 April 1988. When KSY heard of the presentation of the petition it filed the requisite notice of intention to appear to support the petition.

The petition was initially fixed for hearing on 15 April 1988. Later, that date appears to have been vacated and a new date allotted being 30 November 1988. It would appear that the solicitors for Lian Seng sought for that new date to be vacated as well on the ground that it was not suitable for their clients and apparently with the consent of the petitioners but without the knowledge of KSY that date was vacated and 8 March 1989 was allotted as the new date for the hearing of the petition.

On 12 January 1989 KSY took out its *ex parte* application encl. (45) in the Court file seeking an injunction restraining Lian Seng until disposal of the petition from disposing any of its property movable or immovable "including any money received or receivable by way of rentals or otherwise..." as well as a further injunction that would have the effect of freezing all the bank accounts of Lian Seng. The application was filed together with certificate of urgency under the hand of Counsel for KSY who certified that Lian Seng was receiving rental income of some RM1 million per month which it was dissipating. The application was supported by the affidavit, encl. (44), of one Jimmy Chong a Director of KSY.

By the affidavit Mr. Jimmy Chong *inter alia* says that on 31 March 1987 KSY had obtained judgment against Lian Seng in the sum of RM10,529,000 in respect of progress payment due as at June 1986. He went on to say that sometime later the parties agreed that after the

works were completed what would be due to KSY would in fact be RM26,050,000. After completion of the works and after taking into account the said earlier judgment and certain amounts that had been in the meantime paid to account, KSY obtained a further judgment apparently on an O. 14 application for RM12,902,000, on 17 November 1988. In the meantime in the suit in which that O. 14 judgment was obtained KSY had earlier, on 13 August 1988, before Ajaib Singh J, as he then was, obtained an *ex parte* Mareva injunction against Lian Seng. I pause to note that part of that *Mareva* injunction restrains Lian Seng from "removing from the jurisdiction of the Court and or otherwise disposing and or dealing and or in anyway parting with its assets within the jurisdiction of the Court..." That Mareva injunction has not been set aside or discharged.

On 16 November 1988 Lian Seng went before Gunn Chit Tuan J (as he then was) and obtained an injunction restraining KSY from presenting any original winding-up petition against Lian Seng during the subsistence of the instant petition i.e., the petition of Morgan Trust. KSY was also restrained from taking out any form of execution proceeding so long as the Morgan Trust petition subsisted.

Apparently all parties understand that Lian Seng intends to oppose the petition. In fact it had filed a motion encl. (11) in the file to have the petition "set aside".

Now by a letter dated 8 December 1988 the solicitors for Morgan Trust informed the solicitors for KSY that their client had "sold off" its rights on which it had founded the petition, to a 3rd party. A copy of the letter is exhibited and it purports to confirm that the solicitors of KSY have been informed that Morgan Trust:

> has sold and assigned all its right, title and interest in respect of the land which is the subject matter of the abovecaptioned winding-up petition to a 3rd party and as such, (Morgan Trust) have no further interest in the recovery of the sums referred to in the petition.

With the letter was enclosed a copy of Lian Seng's solicitors' application for an adjournment of the hearing of the petition and Morgan Trust's solicitors' letter consenting to the application and it was as a result of those letters that the Senior Assistant Registrar had vacated the earlier date 30 November 1988 and refixed the hearing for the said 8 March 1989.

By para. 11 of the affidavit Jimmy Chong says apropos the sale or assignment of Morgan Trust's said interest that KSY "is desirous to be substituted as a petitioner in the event that the petitioner herein withdraws from the petition."

Having thus laid the background as it were Mr. Jimmy Chong proceeded by paras. 12, 13 and 14 of his affidavit to make some serious charges against Lian Seng. It is contended that since completion of the KL Plaza Lian Seng has been obtaining rentals in excess of RM1 million per month from the Complex which continued to be the position even after the presentation of the petition to wind up Lian Seng which amounts Lian Seng "has been utilising without at all being concerned" (that there was the petition) and without being concerned that there were the amounts owing to unsecured creditors and without being concerned about the terms of s. 223 of the Companies Act (which is the statutory provision for the avoidance of dispositions of property after commencement of winding-up). Mr. Jimmy Chong ends his affidavit by expressing his belief that unless restrained Lian Seng would "continue to utilise these monies by paying management fees or otherwise paying certain debts owing to their related companies and or shareholders and or directors in preference to the unsecured creditors."

In persuading the Court to grant the *ex parte* order sought Counsel for KSY had pointed out to the 1986 accounts of Lian Seng which showed that an amount of RM3,600,000 had been paid as management fees to a subsidiary company. The suggestion was that there was a creaming away of property of Lian Seng at the expense of the creditors, particularly the unsecured creditors. Counsel also relied on his understanding of the effect of the English Court of Appeal decision *Re Gray's Inn Construction Co. Ltd.* [1980] 1 All ER 814 placing particular emphasis on the last paragraph of the headnote at p. 815:

> *Per Curiam.* Where the Court is satisfied that it is in the interest of the general body of creditors of a company which is in the course of being wound up that the company be permitted to continue trading, the Court's proper course is to freeze the company's bank account as at the date of presentation of the winding-up partition by discontinuing all further dealings on the existing account as from that date and requiring all subsequent dealings to be on a new and separate account.

In the face of the evidence of the RM3.6 million being paid out by Lian Seng to some subsidiary of it which *per se* looked suspicious and in the face of Jimmy Chong's belief that an amount in excess of RM12 million was being received by Lian Seng and on the basis of that passage in the headnote of *Re Gray's Inn Construction Co. Ltd.* the *ex parte* orders sought were granted on 13 January 1989.

On 16 January 1989 Lian Seng took out the two instant applications by the one seeking to set aside the said *ex parte* order and for a consequential order for damages to be assessed and by the other seeking an order (in any event) to vary the *ex parte* injunction by unfreezing the bank accounts.

In support of these applications one Lau Hok Choon the general manager of Lian Seng swore an affidavit encl. (49) which was read. He points out *inter alia* that the damaging accusation of Lian Seng creaming off income of the company by payment of RM3.6 million to its subsidiary was misleading and was deliberately made in the manner in which it was made in order to mislead the Court into granting the order it had granted. Mr. Lau Hok Choon went on to explain giving figures in support of his contention that the situation was that the whole complex known as KL Plaza was being managed by the subsidiary which it tried to with the said RM3.6 million and further amounts collected from the tenants and occupiers of the Complex by way of service and other charges. Figures were given to show that in 1986 against revenue (including the said management fee) of RM6,006,039 the operating expenses came to RM7,864,896. For 1987 the management company appears to have just about broken even. In 1988 with a drop in rentals the management company ran at a loss.

It was pointed out that in the Complex were some 200 businesses employing some 2000 people and that the order of the Court freezing the bank accounts had horrendous results in that the task of management of the Complex could not be effected.

Reading Mr. Lau's affidavit it became clear that the whole KL Plaza complex was run by its subsidiary with the help of the so-called management fee and service and other charges that the management company appears to impose on the tenants and occupiers which contrary to KSY's Peter Kuah's complaint by his affidavit encl. (54) is disclosed by Lau Hok Choon at the top of p. 6 of his affidavit encl. (49). The breakdown of the expenditure on the face of it appears not unreasonable and in any event has not been effectively challenged. The accusation of creaming or hiving away of part of the rentals complained of turns out to be on the evidence now before the Court, baseless.

Now what is it that was decided in *Re Gray's Inn Construction Co. Ltd.* With respect I think that both the Counsel misconstrued *Re Gray's Inn* as I did when I was moved to grant the *ex parte* order. One reason for this could be attributed to the said last paragraph of the headnote of the report referred to and reproduced earlier in this judgment. A careful reading of the judgment of Buckley LJ shows that that portion of the headnote has been taken somewhat out of context. In *Re Gray's Inn* a creditor of the company carrying on a building business presented a petition to wind up the company. Immediately prior to the date of presentation of the petition the company was trading at a loss and had an unsecured overdraft of 5322 pounds on its bank account. From the date of presentation of the petition up to the date that the winding up order was made various sums of money were credited to the overdraft account. Buckley LJ was of the view shared by the other two members of the quorum that the effect of the crediting of those sums of money into the overdraft account amounted to an improper preferential discharge of the overdraft in that the bank, *vis-a-vis* the overdraft as it was immediately prior to the presentation of the petition, was an unsecured creditor who had to share *pari passu* with the other unsecured creditors. It was in this context that the learned Judge recommended that in such circumstances the proper cause would have been for the existing overdraft to be frozen and left aside as it were and for the company, if it were in the interest of the general body of creditors that it continues trading, to be allowed to use the services of the bank by operating a new and separate account. "The effect of (that)," said Buckley LJ at p. 821 of the report, "would have been that at and after (the date of presentation of the petition) the old account would have remained overdrawn to the extent of RM5322 which would be provable in the winding up. The new account would initially have been neither in debit not in credit". It should be of great interest generally and for bankers in particular to realise that it is erroneous to read *Re Gray's Inn* as read by me at the *ex parte* stage as laying down a rule that as soon as a bank is aware of the presentation of a winding up petition against one of its corporate customers it is obliged to freeze all the bank accounts of that customer. What the judgment lays down, more as a recommendation than as a rule, is that to avoid any suggestion of preferential discharge of the amount owing on an account in debit, such overdraft accounts should be frozen and a new account or accounts opened. *A fortioroi* if the account is not in debit it may be allowed to be operated if the bank decides to continue to afford facilities to the corporation. It is further recommended that the bank requires personal assurances from the directors of the company that no payments out of the account will be made in discharge of pre-liquidation debts and that all payments out of the account shall be in respect of liabilities incurred in the ordinary course of business subsequent to the presentation of the petition.

In the instant case there has been no suggestion that the accounts sought to be frozen were overdraft accounts which were in debit and there has been no evidence of pre-liquidation debts being discharged which cannot be unravelled when and if an account is taken in the course of distribution if in fact eventually an order to wind up the company is made.

Encik M.S. Murthi of Counsel for Lian Seng *inter alia* contended that in any event the orders made were in duplication of the said order made by Ajaib Singh J. A perusal of the two orders shows that his contention is well-founded. If the Court had realised that the order it was making duplicated an earlier order it would not have made it. Upon realisation that a duplicate order had been made on an *ex parte* basis, on application the Court would normally set it aside as I would in this case. That Lian Seng had ignored the earlier order is no reason for duplicating it. The remedy in that situation is to proceed in contempt which KSY themselves, through Jimmy Chong, say is pending.

These are sufficient reasons for the Court to conclude without considering the other submissions made that the orders made *ex parte* on 13 January 1989, encl. (47), should be set aside. When the *ex parte* order was made it was made for the protection of the unsecured creditors as a whole. In the circumstances the Court had not imposed the usual undertaking in damages on the application and accordingly I do not make any order in respect of damages arising out of having granted the *ex parte* order.

Each of the orders of Court as set out in encl. (47) in the Court file made on 13 January 1989 is set aside. Costs of and incidental to encls. (50) and (51) will be paid by the supporting creditor KSY. There will be no other orders in respect of encls. (50) and (51).

Also found at [1989] 1 CLJ 452